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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. HERMAN GREEN SR., Appellant.	2 CA-CR 2012-0262 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201101869

Honorable Joseph R. Georgini, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Herman Green Sr. was convicted of forty-one felony offenses involving acts of sexual and physical abuse. The trial court sentenced him to consecutive prison terms, including six life sentences. On appeal, Green argues the court erred by denying his motion for a mistrial based on juror misconduct. He further contends the court erred by denying his request for a court-appointed mental health expert to assist him in preparing a defense of guilty except insane. For the reasons stated below, we affirm.

Factual Background and Procedural History

¶2 We view the facts and the inferences drawn from them in the light most favorable to sustaining the jury's verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In September 2010, then fourteen-year-old S.G. called 9-1-1 and reported that her father, Green, had been "having sex with [her] for over nine years" and "harm[ed her and her siblings] a lot." After an investigation, Green was charged by indictment with three counts of child molestation, fifteen counts of sexual conduct with a minor, two counts of aggravated assault, twenty-two counts of child abuse, three counts of sexual abuse, and one count of indecent exposure. Twenty-two of those counts related to S.G., and the remaining counts related to her three siblings.

¶3 At the state's request, the trial court dismissed the indecent exposure count, two counts of child abuse, and one count each of child molestation and sexual conduct. The jury found Green guilty of the remaining charges, and the court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Juror Misconduct

¶4 Green argues the trial court erred by denying his motion for a mistrial based on juror misconduct. We review a trial court's ruling on a motion for a mistrial based on juror misconduct for an abuse of discretion. *State v. Payne*, ___ Ariz. ___, ¶ 96, 306 P.3d 17, 38 (2013). A declaration of mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

¶5 While cross-examining S.G., Green suggested she had fabricated her story or otherwise had been "encourag[ed]" by the forensic interviewer and detective investigating the case. During redirect examination, the state played the first forty-five minutes of S.G.'s seventy-eight-minute video recording of the forensic interview to show that she was not "encouraged during the interview." The jury was given a transcript of the interview as a demonstrative aid while the recording played in court. The recording and transcript were not admitted into evidence.[1] However, the recording was mistakenly sent in with the jury during its deliberations along with the exhibits that had been admitted during the trial.

¶6 Upon learning the jurors had been provided a computer to play the recording, the trial court decided "it would be prudent . . . to individually voir dire the

[1]Over Green's objection, the trial court initially granted the state's motion to admit the recording into evidence. However, the state subsequently clarified that it did not want the recording admitted but only played for the jury during trial.

jurors to determine how much, if at all, of [the recording] they had an opportunity to watch." Both parties agreed with the court's decision. The jurors all stated that a portion of the recording had been played during their deliberations, but not all of them had watched or heard it. Most of the jurors stated they had played approximately ten minutes of the recording. One juror specifically noted that the last time stamp on the video was at nine minutes and twenty-nine seconds, although a few jurors estimated that it had played twenty minutes.

¶7 After all the jurors had been questioned, Green moved for a mistrial on the ground that "[t]he jury, during its deliberations, . . . had access to evidence not admitted in the court." The state responded that "[e]ach of the jurors said that they had seen less of the interview than was played in open court" and suggested that a limiting instruction would be sufficient to address the issue. The trial court denied Green's motion for a mistrial, explaining: "The court is very confident that based on the responses of the individual jurors that they did not see more than the [portion of the recording which] was played for their benefit [at trial]." The court then brought the jury back into the courtroom and explained that the recording was not admitted into evidence, should not have been provided to them, and was only played at trial to show "the types of questions that were asked by the forensic interviewer of [S.G.]"

¶8 On appeal, Green argues the jury committed misconduct by viewing the recording during deliberations. He contends he was prejudiced because by watching the recording the jury in effect watched S.G. "testify a second time unfettered by judicial protections." He maintains this bolstered the credibility of S.G. and her siblings and

"simultaneously" caused the jury to determine that Green was not credible. He also argues the trial court's curative instructions "could not counter the prejudicial effects" of the jury watching the recording because "[e]xpecting the jury . . . to disregard S.G.'s answers and only consider the questions asked is farcical."

¶9 Juror misconduct warrants a new trial if the defendant shows "actual prejudice or if prejudice may be fairly presumed from the facts." *State v. Miller*, 178 Ariz. 555, 558, 875 P.2d 788, 791 (1994); *see also State v. Vasquez*, 130 Ariz. 103, 105, 634 P.2d 391, 393 (1981). A defendant has the burden of proving an allegation that the jury has obtained and considered extrinsic evidence. *State v. Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d 90, 95 (2003). Extrinsic evidence is "information obtained from or provided by an outside source, whether admissible but not admitted at trial or inadmissible for some legal reason." *State v. Dickens*, 187 Ariz. 1, 15, 926 P.2d 468, 482 (1996), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). If the defendant meets his initial burden, "prejudice must be presumed and a new trial granted unless the prosecutor proves beyond a reasonable doubt that the extrinsic evidence did not taint the verdict." *Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d at 95; *see also State v. Davolt*, 207 Ariz. 191, ¶ 58, 84 P.3d 456, 473 (2004). In determining whether extrinsic evidence affected the verdict, courts consider:

> 1. whether the prejudicial statement was ambiguously phrased;
>
> 2. whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial;

> 3. whether a curative instruction was given or some other step taken to ameliorate the prejudice;
>
> 4. the trial context; and
>
> 5. whether the statement was insufficiently prejudicial given the issues and evidence in the case.

Hall, 204 Ariz. 442, ¶ 19, 65 P.3d at 96, *citing United States v. Keating*, 147 F.3d 895, 902-03 (9th Cir. 1998).

¶10 Here, we conclude Green did not meet his burden of establishing that the jury considered extrinsic evidence. The video recording was marked as an exhibit, and the state presented the first forty-five minutes of it at trial. Although the recording contained additional information not presented at trial, the jury did not view that portion of it. Every juror indicated they had played less of the recording during their deliberations than was presented at trial. Accordingly, the jury did not consider extrinsic evidence. Although Green suggests the recording was extrinsic evidence because, although played during trial, it was not admitted as an exhibit, he does not cite any authority for this proposition, and we are aware of none.

¶11 Green's reliance on *United States v. Harber*, 53 F.3d 236 (9th Cir. 1995), to support his argument is misplaced. In that case, the court concluded the defendant was entitled to a new trial because extrinsic material—a case report used by a federal agent to refresh his memory while testifying but not read to the jury or admitted into evidence—had been provided to the jury during deliberations. *Harber*, 53 F.3d at 238-39. But, in *Harber*, the state conceded that the jury had "read and relied upon" the report while

deliberating. *Id.* at 241. Here, the jury did not view the portion of the recording not presented at trial.

¶12 Even assuming the recording constituted extrinsic evidence, we are satisfied beyond a reasonable doubt that it did not affect the verdict. *See Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d at 95. In making this determination, we have considered the *Hall* factors noted above and find the second and fourth particularly relevant. The portion of the recording that was played during deliberations was merely cumulative of—indeed, identical to—evidence presented at trial. *See, e.g., State v. Shearer*, 164 Ariz. 329, 339-40, 793 P.2d 86, 96-97 (App. 1989) (introduction of inadmissible deposition testimony clearly harmless because cumulative). Moreover, the trial court was made aware that the recording had been erroneously provided to the jury before it reached a verdict and provided curative instructions. *See, e.g., State v. Bracy*, 145 Ariz. 520, 526, 703 P.2d 464, 470 (1985) (curative instruction nullified any prejudice defendant suffered from prosecutor's improper statement). Specifically, the court instructed the jury to not "guess or speculate as to any other aspects regarding that interview," to rely on "the testimony and evidence presented in court," and to not consider S.G.'s answers in the interview, only the questions that were asked. We presume the jurors followed the court's instructions. *See State v. Jeffrey*, 203 Ariz. 111, ¶ 18, 50 P.3d 861, 865 (App. 2002).

¶13 Green nevertheless contends that the trial court's curative instructions compounded the prejudice because they "allowed the state to remind the jury of its position that S.G.'s answers were not the result of suggestive questioning or coaching and should be believed." But the state only took that position and used the recording at trial

to rebut Green's suggestion during cross-examination that S.G. was encouraged to fabricate her story. *Cf. State v. Leyvas*, 221 Ariz. 181, ¶¶ 25-26, 211 P.3d 1165, 1172-73 (App. 2009) (defendant opened door to witness's in-court identification on redirect by raising identification-related issues on cross-examination). Moreover, the trial court is in the best position to assess the effects of the allegedly extrinsic evidence and to determine appropriate curative instructions. *Hall*, 204 Ariz. 442, ¶ 23, 65 P.3d at 97. Accordingly, we cannot say the court abused its discretion in denying Green's motion for a mistrial. *See Payne*, ___ Ariz. ___, ¶ 96, 306 P.3d at 38.

Mental Health Expert

¶14 Green next contends the trial court erred by denying his request for a court-appointed mental health expert to support his defense of guilty except insane. Appointment of experts is within the sound discretion of the trial court. *Jones v. Sterling*, 210 Ariz. 308, ¶ 29, 110 P.3d 1271, 1278 (2005); *State v. Amaya-Ruiz*, 166 Ariz. 152, 182, 800 P.2d 1260, 1290 (1990). Absent substantial prejudice, we will not disturb a court's refusal to appoint an expert. *State v. Peeler*, 126 Ariz. 254, 257, 614 P.2d 335, 338 (App. 1980).

¶15 Approximately six weeks before trial, despite being represented by counsel, Green filed a pro se motion requesting a competency examination pursuant to Rule 11, Ariz. R. Crim. P. The trial court granted Green's request and appointed Dr. George DeLong to conduct the examination. The court denied Green's request that Dr. DeLong's examination include a "prescreen" for a possible guilty except insane defense. After conducting the competency examination, Dr. DeLong concluded Green exhibited

"[n]o indicators of the presence of a mental illness/cognitive disorder that would compromise [his] competence" to stand trial. He also determined no further evaluation was warranted. Green then filed a pro se motion for a guilty except insane examination, and his attorney filed a motion requesting the appointment of Dr. David Hermosillo-Romo for that purpose.[2] At a hearing on those motions, Dr. Hermosillo-Romo testified solely on the basis of information provided to him by Green's attorney during prior telephone conversations. Dr. Hermosillo-Romo offered four possible diagnoses for Green: delusional disorder, pedophile sexual deviancy, mental retardation, and malingering.

¶16 At the conclusion of the hearing, the trial court stated that it would not prohibit Green from pursuing a guilty except insane defense but denied his request that Dr. Hermosillo-Romo be appointed to assist him at the county's expense.[3] The court explained:

> I've heard the proposed expert from the Defense, read the file, and I've had the opportunity, quite frankly, to experience this case and Mr. Green . . . .
>
> . . . We have had about eight months where the Court has had the benefit of reading, seeing, hearing, Mr. Green. The Court read what has attempted to be very persuasively written motions, persuasively written letters. The Court has

[2]The state filed a memorandum in response to Green's motion arguing in part that "[Green's] notice of [the] insanity defense [wa]s untimely," pursuant to Rule 15.2(b), Ariz. R. Crim. P. The trial court, however, rejected that argument, instead allowing him to present the defense and addressing the merits of the appointment request.

[3]The trial court further indicated Green was not precluded from using Dr. Hermosillo-Romo, provided that the doctor could undertake the case "knowing full-well that [Green] is indigent."

> conducted colloquy with Mr. Green on several issues . . . . There have been times of hybrid representation, that Mr. Green has taken on that role.
>
> . . . [B]ased on everything that this Court has observed throughout the entirety of this case, I don't find a reasonable basis for appointing [Dr. Hermosillo-Romo] for the defendant.

¶17 Green maintains the trial court erroneously "believed that [he] needed to produce some quantum of evidence in support of the insanity defense before an expert would be appointed." Relying on Rule 15.9(a), Ariz. R. Crim. P., and *Ake v. Oklahoma*, 470 U.S. 68 (1985), Green contends that he was entitled to the appointment of an expert to assist him in preparing a defense of guilty except insane. We disagree. Rule 15.9(a) provides in relevant part: "An indigent defendant may apply for the appointment of an investigator and expert witness . . . to be paid at county expense if the defendant can show that such assistance is reasonably necessary to present a defense adequately at trial or sentencing." "[T]he decision [then] rests in 'the sound discretion of the trial court'" whether to make the appointment. *Jones*, 210 Ariz. 308, ¶ 29, 110 P.3d at 1278, *quoting State v. Gretzler*, 126 Ariz. 60, 90, 612 P.2d 1023, 1053 (1980).

¶18 Green's reliance on *Ake* is equally misplaced. In that case, the issue was whether due process requires the state to provide an indigent defendant "access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question." *Id.* at 70. In reversing the defendant's conviction and remanding for a new trial, the Court noted that "Ake's mental state at the time of the offense was a substantial factor in

his defense" and "the trial court was on notice of that fact when the request for a court-appointed psychiatrist was made." *Id.* at 86.

¶19 The Court based its conclusion on the following factors, none of which are present in this case: First, Ake relied solely on the defense of insanity. Here, Green also claimed he was actually innocent and relied on that defense at trial. Second, Ake's sanity was a serious issue from the early stages of the case. *Id.* At his arraignment, Ake's behavior was "so bizarre" that the trial court, on its own motion, ordered him to be examined by a psychiatrist, who found Ake incompetent to stand trial. *Id.* Although Ake later was found to be competent, a psychiatrist informed the court that Ake's condition would remain stable only if he continued to receive an antipsychotic drug. *Id.* In contrast, Green exhibited none of the bizarre behavior during court proceedings that occurred in *Ake*. The trial court stated it had observed Green over a prolonged period and Green did not display any behavior that would warrant the appointment of an expert. Even though the court nevertheless ordered a competency evaluation, Green was determined to be competent to stand trial. Third, the psychiatrists who had examined Ake for competency also informed the trial court of the severity of his mental illness less than six months after committing the offense, and they suggested his illness may have begun years earlier. *Id.* Here, although Dr. Hermosillo-Romo suggested that Green may have a delusional disorder, he clarified that he was "not making the diagnosis" but was merely "suggesting the possibility of a delusional disorder as one of the mental health disorders that may be applied in the case." He also said, "[t]he mental health professional who has seen the patient and done [a] direct examination and an evaluation of a patient is

in a better position to say the treatment or give an opinion about the defendant in question." Notably, two other doctors had evaluated Green. Dr. Carlos Vega prepared a psychological evaluation in March 2011 as part of juvenile court severance proceedings, and his report was disclosed in this case. Dr. Vega opined that Green has a narcissistic personality disorder and paraphilia not otherwise specified, which Green admitted "would not constitute a valid insanity defense." Dr. DeLong also concluded Green "may be malingering symptoms of mental illness" and no further evaluation was warranted.

¶20 In *Ake*, the Court held that "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense," the state must, at a minimum, provide "the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. But we do not interpret the Court's holding to mean that a defendant has made the "threshold showing to the trial court" simply by stating "that his sanity is likely to be a significant factor in his defense." *Id.* at 82-83. There must be a reasoned basis for determining the insanity defense is viable based on a showing that the defendant's mental condition at the time of the offense is seriously in question. Indeed, the Court in *Ake* acknowledged that "[a] defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not." *Id.* at 82. *See also Jones*, 210 Ariz. 308, ¶ 33, 110 P.3d at 1279 (before appointing expert under Rule 15.9(a) to prove selective enforcement defense, trial court must determine that defendant presented

credible evidence of discriminatory effect and intent); *State v. Apelt*, 176 Ariz. 369, 375, 861 P.2d 654, 660 (1993) ("Mere undeveloped assertions that the requested assistance would be beneficial are not enough.") (internal citation omitted).

¶21 Consistent with this reasoning, the state points to A.R.S. § 13-4506(A), which authorizes an "examination for purposes of insanity defense" only after the court makes "a determination that a reasonable basis exists to support the plea of insanity." Although the statute does not relate solely to the appointment of mental health experts for indigent defendants, it nevertheless indicates that there must be a "reasonable basis" to support an insanity defense before the court is required to appoint experts or order treatment. *See State v. Baca*, 187 Ariz. 61, 64-65, 926 P.2d 528, 531-32 (App. 1996) (statutes and rules part of same subject matter viewed together).

¶22 Green, nevertheless, argues "the trial court erroneously relied on its own post-indictment observations and interactions with . . . [him] to determine that there was no reasonable basis for a defense of insanity." The insanity defense is based on a defendant's mental capacity at the time of the commission of the offense, not the time of the trial. A.R.S. § 13-502(A). However, an indigent defendant's subsequent behavior, including his actions in court, may be relevant in determining whether to appoint a county-paid expert to support his defense of guilty except insane. Indeed, in *Ake*, the Supreme Court specifically noted the defendant's behavior at arraignment in determining whether his mental state was a substantial factor in his defense. 470 U.S. at 86.

¶23 We also do not agree with Green's argument that he was prejudiced because the trial court's denial of his request for a county-funded expert "prevented him

from adequately presenting the defense." As the state points out, in a post-trial psychiatric evaluation, Dr. Jack Potts concluded that "within a reasonable degree of psychiatric certainty . . . at the times of the offenses Mr. Green was . . . not suffering from a mental disease or defect." Green has failed to meet his burden of proving prejudice. *See Peeler*, 126 Ariz. at 257, 614 P.2d at 338. We thus find no abuse of discretion in the court's denial of Green's request for a county-paid mental health expert to support his defense of guilty except insane. *See Jones*, 210 P.3d 308, ¶ 29, 110 P.3d at 1278.

Disposition

¶24 For the foregoing reasons, we affirm.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge